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Torts - Intentional Infliction of Emotional Distress - Physical Injury or Independent Tort Is No Longer Required

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TORTS—INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS—PHYSICAL INJURY OR INDEPENDENT TORT IS NO LONGER REQUIRED. *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980).

Shirley Ann Counce was employed as a cashier at M.B.M. Company's place of business, Coleman's Bar-B-Q, in West Memphis, Arkansas. She worked the night shift on February 1, 1977. The following morning, it was discovered that approximately ninety-nine dollars in checks and money were missing from the cash register. The manager of the store called Counce at her home and asked her about the incident. Counce explained that she had no knowledge of the missing money and that she had followed routine procedure at the end of her shift by placing all checks and money in a sack and then depositing the sack in a vault.[1] Later, the manager called Counce again and told her that she had been laid off because the company had too much counter help.[2] Counce asked when she could pick up her check and was told that she would be required to submit to a polygraph test before the company would release it.

Counce took a polygraph test and passed. The following day she received a check in the amount of eighty-one cents for her last seventeen hours of work. Jerrell Moss, the company's area superviser, explained that thirty-three dollars was deducted from her check because of the money that was missing from the cash register.[3]

Counce was unable to find additional work and filed a claim for unemployment benefits. She was told that she was disqualified from receiving benefits because the Coleman Bar-B-Q report indicated that she had been fired because of numerous customer com-

1. During the course of the plaintiff's deposition, she explained that the routine procedure was to take all of the money out of the cash register, place it in a sack, and then deposit it in a vault built into the floor. A money count was taken and a report was filled out, but no total was computed on the report. Record at 88-89.

2. Jerrell Moss, the area supervisor for M.B.M. Company, explained in his deposition that plaintiff was fired because of customer complaints and the disappearance of money on her shift. Record at 42. However, the plaintiff stated that her manager, Jan Hylander, explained that she was fired because the company had too much counter help. Record at 86.

3. Mr. Moss explained that the deduction was the result of the cash shortage which happened on the night shift when the plaintiff was working. He stated that two other girls also had a $33 deduction from their checks because of the cash loss. Record at 46-47.

plaints, her bad attitude, and violation of company policies.[4]

Counce sued M.B.M. Company alleging that its actions were intended to cause her severe emotional distress. The trial court granted the defendant's motion for summary judgment. The Arkansas Court of Appeals reversed, holding that a material issue of fact was in dispute as to whether the plaintiff was entitled to damages caused by the intentional infliction of emotional distress.[5] The Arkansas Supreme Court affirmed the appellate decision, recognizing for the first time the intentional infliction of emotional distress as a distinct and independent tort. *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980).[6]

The courts in both England and America have shown reluctance to recognize the interest in peace of mind as a legally protected right.[7] In *Lynch v. Knight*[8] Lord Wensleydale succinctly expressed the attitude of the nineteenth century English courts: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone. . . ."[9] Hence, in the case of *Victorian Railways Commissioners v. Coultas*,[10] the Privy Council held that plaintiff could not recover damages for nervous shock suffered when the defendant's

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4. ARK. STAT. ANN. § 81-1106(b) (1976) provides:

For all claims filed on and after July 1, 1973, if so found by the Director, an individual shall be disqualified for benefits:

. . . .

(1) If he is discharged from his last work for misconduct in connection with the work. Such disqualification shall be for eight [8] weeks of unemployment as defined in subsection (i) of this section, except that

(2) If he is discharged from his last work for misconduct in connection with the work on account of dishonesty, drinking on the job, reporting for work while under the influence of intoxicants, or wilful violation of the rules or customs of the employer pertaining to the safety of fellow employees or company property, he shall be disqualified from the date of filing his claim until he shall have ten [10] weeks of employment in each of which he shall have earned wages equal to at least his weekly benefit amount.

5. Counce v. M.B.M. Co., 266 Ark. 1064, 597 S.W.2d 92 (Ct. App. 1979). The court of appeals held that there was a material issue of fact whether the plaintiff suffered emotional distress because of wrongful discharge by the defendant. *Id.* at 1069, 597 S.W.2d at 95.

6. The Arkansas Supreme Court also held that the plaintiff had no cause of action for breach of contract when, as here, the contract of employment was terminable at will and when there was no indication of any violation of a clearly established public policy. M.B.M. Co. v. Counce, 268 Ark. 269, 280, 596 S.W.2d 681, 688 (1980).

7. W. PROSSER, TORTS § 12, at 49-50 (4th ed. 1971).

8. 11 Eng. Rep. 854 (1861).

9. *Id.* at 863. *See also* Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

10. 13 A.C. 222 (1888).

train nearly ran into the buggy in which the plaintiff was a passenger. The Council stated that damages arising from mere sudden terror, unaccompanied by physical injury, were not allowable in an action based on negligence.[11]

Later cases in England expressed dissatisfaction with the *Coultas* rule so that by 1915, English law had recognized the right to recover damages for nervous shock without physical injury.[12] However, in *Wilkinson v. Downton*,[13] a case decided before the turn of the century, damages for mental suffering were held allowable when the defendant, as a practical joke, falsely represented to the plaintiff that her husband had been in a serious accident in which both of his legs were broken. The court upheld a jury award for mental suffering of the plaintiff caused by these statements. The court distinguished this case from *Coultas* on the basis that the defendant's statements were calculated to be misleading and the damages suffered were predictable and not too remote from the act complained of.[14]

The United States was much slower than England in recognizing the right to "tranquility of the mind."[15] In the same year that *Coultas* was decided in England, the Supreme Court of New York held in *Lehman v. Brooklyn City Railroad*[16] that a plaintiff could not recover damages for physical injuries caused by nervous shock as the result of being frightened by the defendant's runaway horse. Although many jurisdictions repudiated the rule of nonliability for mental suffering,[17] *Lehman* and its progeny[18] became the leading

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11. *Id.* at 225.

12. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 263 (1920). In the case of Coyle v. Watson, [1915] A.C. 1, the court expressed the evolution of the law on the issue:

> But in England, in Scotland, and in Ireland alike, the authority of *Victorian Railways Commissioners v. Coultas* has been questioned, and, to speak quite frankly, has been denied. I am humbly of opinion that the case can no longer be treated as a decision of guiding authority. . . . I should add that other cases were cited showing it to be fully established by authority—recent and strong authority—that physical impact or lesion is not a necessary element in the case of recovery of damage in ordinary cases of tort.

[1915] A.C. at 13-14.

13. [1897] 2 Q.B.D. 57.

14. *Id.* at 59-60. *See also* Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 42 (1956), where Prosser states that the *Wilkinson* case is actually the first case to recognize the infliction of emotional distress as a cause of action.

15. Throckmorton, *supra* note 12, at 263.

16. 47 Hun. 355 (N.Y. 1888).

17. *See* Throckmorton, *supra* note 12, at 265 n.28 stating that, by 1920, seventeen jurisdictions had adopted the rule of recovery in allowing damages for nervous shock without actual impact.

cases on this subject in America. Consequently, the rule of law was established in many jurisdictions that recovery of damages for nervous shock was not allowable without physical impact.[19]

An exception to the rule of nonliability developed in cases in which the defendant's conduct was intentional or reckless.[20] Hence, another rule developed in American law arising from the case of *Wilkinson v. Downton*,[21] which allowed an award of damages for mental distress on the basis of the defendant's outrageous and intentional conduct, but only if the defendant's conduct involved an independent tortious act upon which one could append an award for mental distress.[22] Around 1930, many jurisdictions dropped the requirement that an award for mental distress had to be predicated upon an independent cause of action and recognized the intentional infliction of mental distress as a distinct cause of action.[23]

Arkansas was reluctant to accept the "new" tort, or, as it was sometimes called, the "tort with no name."[24] As early as 1878, Chief Justice English, speaking for the Arkansas Supreme Court, stated: "[T]he ground of recovery must be something beside an injury to the feelings and affections . . . there must be a loss to the claimant that is capable of being measured by a pecuniary standard."[25] Damages for mental anguish were not allowed in *Peay v. Western Union Telegraph Co.*,[26] in which late delivery of a telegram caused the plaintiff to miss the funeral of a close relative. The Arkansas Supreme Court recognized the rule in *Coultas* and held that there was no right of

18. Spade v. Lynn & Boston Ry., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Ewing v. Pittsburgh, C., C. & St. L. Ry., 147 Pa. 40, 23 A. 340 (1892).

19. *See* Throckmorton, *supra* note 12, at 264 n.25.

20. In Spade v. Lynn & Boston Ry., 168 Mass. 285, 47 N.E. 88 (1897) the court seemed to take this viewpoint for granted:

> It is hardly necessary to add that his decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind.

Id. at 288, 47 N.E. at 89.

21. [1897] 2 Q.B.D. 857.

22. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 42-43 (1956).

23. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

24. *Id.* at 874-75.

25. Little Rock & Fort Smith Ry. v. Barker, 33 Ark. 350, 359-60 (1878).

26. 64 Ark. 538, 43 S.W. 965 (1898).

recovery for mental pain unaccompanied by physical injury.[27] In *St. Louis, Iron Mountain & Southern Railway v. Bragg*[28] the court disallowed any recovery of damages for fright when the plaintiff, with her two children, was put off of the defendant's train on a dark night and told by the brakeman that she would need to cross a cattle crossing to get to the train depot. The Arkansas Supreme Court held that she could not recover damages for fright, even though she may have suffered physical injuries resulting from fright.[29] The rule in *Bragg* and *Peay* was carried one step further in the case of *St. Louis, Iron Mountain & Southern Railway v. Taylor*[30] in which the Arkansas Supreme Court stated that damages for the infliction of mental suffering cannot be made the subject of an independent action even when the act complained of was intentional.[31]

It was not until 1920 that the rule of nonliability was relaxed to a certain degree. In *Rogers v. Williard*[32] the defendant unlawfully entered the plaintiff's premises and threatened to shoot the plaintiff's husband. The plaintiff was pregnant at the time and the defendant's actions caused her to have a miscarriage. The Arkansas Supreme Court held that damages for fright were recoverable when the fright was the result of a willful wrong, and the mental disturbance caused some type of bodily injury.[33] In *Stevenson v. John J. Grier Hotel Co.*[34] the court ruled that mental distress was a proper element of damages when a hotel manager wrongfully ejected the plaintiff from the hotel and, in the presence of several people, falsely accused her of adultery. The court did not depart from the rule requiring a physical injury in order to recover damages for mental

27. *Id.* at 545-47, 43 S.W. at 966-67.

28. 69 Ark. 402, 64 S.W. 226 (1901).

29. *Id.* at 405-06, 64 S.W. at 277. *See also* Hines v. Witherspoon, 143 Ark. 131, 219 S.W. 1014 (1920); Chicago, R. I. & Pac. Ry. v. Mizell, 118 Ark. 153, 175 S.W. 396 (1915). In *Mizell*, the rule was again stated that there is no recovery for mental anguish without an accompanying physical injury. The court emphasized that there must be a connection between the physical injury suffered and the mental anguish. *Id.* at 155, 175 S.W. at 396-97.

30. 84 Ark. 42, 104 S.W. 551 (1907).

31. *Id.* at 48-49, 104 S.W. at 553. The rule in *Taylor* was subsequently reaffirmed in the cases of Pierce v. St. Louis, Iron Mountain & S. Ry., 94 Ark. 489, 127 S.W. 707 (1910), and Chicago, R. I. & Pac. Ry. v. Moss, 89 Ark. 187, 116 S.W. 192 (1909). *Cf.* Chicago, R. I. & Pac. Ry. v. Allison, 120 Ark. 54, 178 S.W. 401 (1915) (The court allowd the plaintiff, a white person, to recover damages for mental anguish when she was forced to ride in the negro coach of a train, holding that she had a statutory right to ride in the white coach, and therefore, the defendant had breached the contract of carriage. Accordingly, it was proper for the jury to consider any humiliation suffered in measuring damages.)

32. 144 Ark. 587, 223 S.W. 15 (1920).

33. *Id.* at 592-93, 223 S.W. at 17.

34. 159 Ark. 44, 251 S.W. 355 (1923).

distress, but rather found a constructive physical injury resulting from the hotel manager's restraint and coercion of the plaintiff.[35]

The court broke new ground in *Lyons v. Smith*[36] and brought Arkansas in line with those jurisdictions allowing damages for mental suffering absent physical injury when accompanied by an independent, actionable tort.[37] In *Lyons* the defendant had trespassed upon the plaintiff's property and, by using threats and intimidations, had prevented an employee from plowing the lands. The defendant contended on appeal that a jury instruction which allowed consideration of damages for mental suffering was erroneous since there was no evidence of any physical injury.[38] The Arkansas Supreme Court disagreed, stating that mental suffering can serve as an element of damages for another tortious wrong.[39] Finally, in *Erwin v. Milligan*[40] the court held that damages were recoverable for mental anguish when the defendant made indecent proposals to the plaintiff. Citing *Rogers v. Williard*[41] the court held that when the action is based on the intentional wrongful conduct of the defendant, damages for mental anguish are recoverable without physical injury.[42] Although a technical battery could be found from the facts in *Erwin*, the court made no reference to any independent tortious wrong in order to provide a basis for recovery.[43]

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35. *Id.* at 46-47, 251 S.W. at 356. The court cited Chicago, R. I. & Pac. Ry. v. Moss, 89 Ark. 187, 116 S.W. 192 (1909), in which the Arkansas Supreme Court first stated that the physical injury need not be actual but may be constructive. *See also* Arkansas Motor Coaches, Ltd. v. Whitlock, 199 Ark. 820, 136 S.W.2d 184 (1940).

36. 176 Ark. 728, 3 S.W.2d 982 (1928).

37. *See* Prosser, *supra* note 22, at 42-43.

38. Lyons v. Smith, 176 Ark. 728, 729-30, 3 S.W.2d 982, 983 (1928).

39. *Id.* at 730, 3 S.W.2d at 983. It is interesting to note that although *Lyons* introduced a new rule of law with respect to damages for mental suffering, no authority was cited. The decision seems to be based on public policy considerations, rather than any established rule of law. The rule of *Lyons* was reiterated in Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930), in which the court held that recovery for mental suffering was allowable when it formed an element of damages for an actionable tortious wrong; in this case, the plaintiff's right to personal security. *Wilson* involved a situation in which five men went to the plaintiff's home late one night, accused him of stealing hogs, and told him to be out of town within ten days or they would hang him.

40. 188 Ark. 658, 67 S.W.2d 592 (1934).

41. 144 Ark. 587, 223 S.W. 15 (1920).

42. Erwin v. Milligan, 188 Ark. 658, 663, 67 S.W.2d 592, 594 (1934). The opinion does not mention Davis v. Richardson, 76 Ark. 348, 89 S.W. 318 (1905), in which the court held that indecent proposals cannot serve as the basis for recovery of damages for mental anguish when unaccompanied by physical injuries.

43. *See* Prosser, *supra* note 22, at 46-47. This rule was contrary to the general rule about which Judge Magruder remarked: "[T]here is no harm in asking." Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1055 (1936).

The court took a new perspective of negligence actions in *Olan Mills, Inc. v. Dodd*.[44] In that case, the court sustained an award of $2500 for the mental anguish, humiliation and embarrassment suffered by the plaintiff as a result of the defendant's using the plaintiff's photograph on a post card for advertising purposes. Although damages were awarded primarily for the mental anguish suffered, the court based plaintiff's right to recover on another tortious wrong: the invasion of privacy.[45]

In *M.B.M. Co. v. Counce*[46] the Arkansas Supreme Court abandoned the idea that a physical injury (either actual or constructive) or an independent tortious act is necessary to justify a recovery for damages relating to mental suffering. The court recognized the intentional infliction of emotional distress as an independent tort for which damages are recoverable.[47] Relying heavily upon the RESTATEMENT (SECOND) OF TORTS,[48] the court adopted the position that the defendant's conduct must be extreme and outrageous to warrant an award for emotional distress.[49] It is not enough that the defendant has acted with an intent to commit a tortious wrong. His conduct must "go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."[50] Also, the emotional distress suffered must be so severe that a reasonable person of ordinary sensibilities could not endure it.[51] Furthermore, the defendant must either willfully or wantonly cause the mental suffering.[52] Affirming the court of appeals, the Arkansas Supreme Court stated that there was a material issue of fact con-

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44. 234 Ark. 495, 353 S.W.2d 22 (1962).

45. *Id.* at 499, 353 S.W.2d at 24. In Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E.D. Ark. 1959), Chief Judge Henley made the statement that Arkansas was an "impact state," requiring a physical injury before one could recover damages for negligently inflicted mental distress. However, with *Olan Mills*, this rule may have been abrogated. Although a physical factor was involved in *Olan Mills*, *i.e.*, loss of weight and sleeplessness, the court made no mention of either of these factors to justify recovery.

46. 268 Ark. 269, 596 S.W.2d 681 (1980).

47. *Id.* at 279-80, 596 S.W.2d at 687-88.

48. RESTATEMENT (SECOND) OF TORTS § 46 (1965) states:

> Outrageous Conduct Causing Severe Emotional Distress (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

49. M.B.M. Co. v. Counce, 268 Ark. 269, 280, 596 S.W.2d 681, 687-88 (1980).

50. *Id.* at 280, 596 S.W.2d at 687. *See also* RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965).

51. M.B.M. Co. v. Counce, 268 Ark. 269, 280, 596 S.W.2d 681, 687 (1980). *See also* RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).

52. M.B.M. Co. v. Counce, 268 Ark. 269, 280, 596 S.W.2d 681, 687 (1980).

cerning whether defendant's conduct in refusing to pay plaintiff until she took a polygraph test and in subsequently deducting thirty-three dollars from her check after she passed the test constituted extreme and outrageous conduct designed to cause severe emotional distress.[53]

The impact of *M.B.M. Co. v. Counce* on the substantive law in Arkansas remains to be seen. Earlier Arkansas decisions, although never actually recognizing the intentional infliction of emotional distress as an independent tort, have strained to find a "physical injury" or "actionable tortious wrong" in order to justify an award for mental suffering.[54]

In *Young v. Skaggs Drug Centers, Inc.*,[55] a decision which was rendered about one month after *M.B.M. Co.*, Judge Henry Woods, without reference to *M.B.M. Co.*, noted that Arkansas was "in the forefront of those states permitting recovery for insult and outrage, the so-called 'tort without a name.'"[56] The court cited *Wilson v. Wilkins*,[57] stating that the Arkansas Supreme Court had affirmed a recovery of damages when there was "no allegation of any pain beyond mental anguish and humiliation."[58] The court also noted that in *Erwin v. Milligan*,[59] Arkansas recognized that inviting an unwilling woman to commit illicit intercourse was an actionable tort.[60] In both cases, however, other tortious wrongs were involved: infringement of the right to personal security and a technical battery.[61] It could be inferred that no action for mental suffering would lie in either of these cases without the presence of another tortious wrong.[62] In light of these conflicting interpretations, *M.B.M. Co.* is

53. The court considered the inconsistent statements of Jerrell Moss, the area supervisor, to the Employment Security Division concerning the plaintiff's unsatisfactory conduct to be a significant factor. *Id.* at 281, 596 S.W.2d at 688.

54. For example, in Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930), the court based the right to recover mental damages on an infringement of the plaintiff's right to personal security. Also, in Stevenson v. John J. Grier Hotel Co., 159 Ark. 44, 251 S.W. 355 (1923), the court strained the doctrine of "constructive physical injury" in finding that restraint and coercion provided a basis for recovery.

55. 487 F. Supp. 1184 (E.D. Ark. 1980).

56. *Id.* at 1186.

57. 181 Ark. 137, 25 S.W.2d 428 (1930). This case is discussed at note 39 *supra*.

58. Young v. Skaggs Drug Centers, Inc., 487 F. Supp. 1184, 1187 (E.D. Ark. 1980).

59. 188 Ark. 658, 67 S.W.2d 592 (1934).

60. Young v. Skaggs Drug Centers, Inc., 487 F. Supp. 1184, 1187 (E.D. Ark. 1980).

61. *See* Prosser, *supra* note 22, at 42.

62. Justice Fogleman raises this point in M.B.M. Co. v. Counce, 268 Ark. at 279, 596 S.W.2d at 687.

significant because it makes clear an area of the law that has been in disarray and confusion from its inception.

The court in *M.B.M. Co.* was not presented with the question of whether negligence can provide an action for the infliction of emotional distress. In future cases the court may narrowly construe the *M.B.M. Co.* decision since it declares that the defendant's conduct must be "wilful or wanton"[63] to be actionable. Therefore, the Arkansas decisions previously discussed may still be valuable precedent when a defendant, by his negligent conduct, causes mental distress.[64] If so, the plaintiff will be required to show some type of physical injury[65] or an independent tortious act.[66]

Regardless of the court's narrow holding in *M.B.M. Co.*, it has provided this jurisdiction with a distinct, actionable tort. At the very least, it has given the so-called "tort with no name" a title.

John P. Lewis

63. M.B.M. Co. v. Counce, 268 Ark. at 280, 596 S.W.2d at 688 (1980).

64. *See generally* W. PROSSER, TORTS § 54, at 327 (4th ed. 1971).

65. *See* Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688, 697 (E.D. Ark. 1959), and cases cited therein.

66. Olan Mills, Inc. v. Dodd, 234 Ark. 495, 353 S.W.2d 22 (1962).